STATE PERSONNEL BOARD, STATE OF COLORADO

Case No. 99B058

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

VINCENT J. CAPOZZELLA,

Complainant,

VS.

DEPARTMENT OF CORRECTIONS, CANON TERRITORIAL CORRECTIONAL FACILITY,

Respondent.

This matter came on for hearing before Administrative Law Judge Mary S. McClatchey on September 3, 1999. Respondent was represented by Cristina Valencia, Assistant Attorney General, Office of the Colorado Attorney General. Complainant appeared and represented himself.

Complainant was the only witness on his own behalf.

Complainant's Exhibits A, B, C, D, E, I, J, M, O, P, Q, R, and S were stipulated into evidence. Complainant's Exhibit G was admitted over objection. Complainant's Exhibit H was offered into evidence but not admitted. TAPE ISSUE

Respondent's Exhibits 1 - 13 were stipulated into evidence.

MATTER APPEALED

Complainant appeals his administrative termination after having exhausted all available leave, claiming he was discriminated against on the basis of disability discrimination. For the reasons set for below, respondent's action is <u>affirmed</u>.

ISSUES

- 1. Whether the Respondent discriminated against Complainant on the basis of disability.
 - 2. Whether the actions of the Respondent were arbitrary, capricious, or contrary

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to rule or law.

PRELIMINARY MATTERS

Complainant was administratively terminated, and he bore the burden of proof on the discrimination claim. Therefore, he presented his case first. At the close of Complainant's case, Respondent moved for directed verdict. A motion for directed verdict should be granted only when the evidence has such quality and weight as to point strongly and overwhelmingly to the fact that reasonable persons could not arrive at a contrary verdict. See, <u>Jorgensen v. Heinz</u>, 847 P.2d 1981 (Colo. App. 1992), cert. denied. In passing on a motion for directed verdict, a trial court must view evidence in the light most favorable to the party against whom the motion is directed, and every reasonable inference drawn from the evidence presented is to be considered in the light most favorable to that party. <u>Pulliam v. Dreiling</u>, 839 P.2d 521 (Colo. App. 1992).

For the reasons set forth below, Respondent's motion for directed verdict was granted.

FINDINGS OF FACT

- 1. Complainant commenced employment with DOC on September 1, 1996 as a Correctional Security Services Officer I. This position involved contact with inmates on a regular basis. The Position Description states that the Correctional Officer "Routinely and systematically conducts physical pat searches, strip searches, shakedowns of cells, common areas of the informary ward to prevent and limit the concealment of contraband. Monitoring the welfare and security of the inmates, ward, emergency exit doors, guarding against possible escapes and breaches of security." "Regulate and direct all inmate and DOC personnel flow."
- 2. Complainant worked in the infirmary, which required contact with inmates on a daily basis.
- 3. On May 28, 1998, Complainant contacted Respondent to request medical leave for a serious health condition. On that date, Complainant's appointing authority, Larry Embry, sent Complainant a letter outlining his leave status. That memo stated the following: Family Medical Leave would be exhausted on June 30, 1998; sick and annual leave would be exhausted on June 14, 1998.
- 4. On June 6, 1998, Complainant had triple coronary artery bypass surgery.
- 5. On June 8, 1998, Complainant's claim for short term disability was approved.
- 6. On June 26, 1998, Complainant contacted Warden Embry to request that he be allowed to return to duty "when released by my doctor to a position for one year which

would limit physical contact with inmates." Complainant requested a position with either the Investigative staff or the Training Academy staff.

- 7. On July 27, 1998, Warden Embry rejected the request based on the inability of any position to limit physical contact with inmates and because he was not classified for any other position.
- 8. On July 14, 1998, Dr. Barber completed the State of Colorado Medical Certification Form ("Certification"), in which he indicated Complainant's condition to be "coronary artery bypss x 3", for which the "probable duration of the condition" was "at least 6 months more recovery [?] of sternotomy." (Emphasis added.)
- 9. Also on July 14, 1998, Dr. Barber completed the disability insurance company form, Physican's Report. He classified Complainant's Functional Classification, as "Class II, Patients with cardiac disease and with slight limitation of physical activity. They are comfortable with mild exertion but experience symptoms with the more strenuous grades of ordinary activity." He classified Complainant's Therapeutic Classification as, "Class C, Patients with cardiac disease whose ordinary physical activity should be moderately restricted and whose more strenuous efforts should be discontinued."
- 10. On July 14, 1998, Complainant's physician, Michael J. Barber, M.D., wrote a letter to Warden Embry, in which he stated the following, in part:

I am the cardiologist in charge of Mr. Capozzella's medical management and was the one who recommended that he undergo bypass surgery. Mr. Capozella (sic) is now approximately six weeks post triple bypass surgery and overall is doing relatively well. In spite of his good progress, I am somewhat uncomfortable with giving him an unconditional release to return to work.

Specifically, Mr. Cappozzella has progressive coronary artery disease and is now post median sternotomy (a split chest). I do not feel that he is ready to reutrn to a situation where he may be placed in phnysical and/or mental confrontation. I will be reevaluating him in approximately six months at which time the situation may be reassessed. While I do feel that he can be in an administrative or investigational environment, I do not feel that he should be placed in a position where significant physical contact with a prisoner could occur.

- 11. The information in Paragraphs 8, 9, and 10 herein regarding Complainant's postoperative split chest and the need for at least six more months of recovery is the only evidence introduced at hearing regarding any physical impairment of Complainant.
- 12. On July 27, 1998, Warden Embry wrote to Complainant:

We received the letter from your physician concerning your medical condition and fitness to return to work. He expressed his concern about giving you an

unconditional release to return to work, specifically where significant physical contact with prisoners occurs on a daily basis. The possibility of physical contact with inmates is always imminent in the correctional setting, regardless of the post one is assigned to. This is due to the necessity to change staff assignments based on facility needs and/or emergencies. This is defined by the PDQ for your classification as a Correctional Security Services Officer I.

It appears that any assignment as an officer would exacerbate your condition, and therfore I am unable to accommodate your restrictions. As you are not classified in any other position, I am unable to reassign you to other duties at this time.

Please submit another medical certification and fitness-to-return certificate when you are able to return to work without any restrictions."

- 13. On August 8, 1998, Complainant wrote a letter to the DOC ADA coordinator, requesting investigation of Warden Embry's determination that Complainant could be terminated after exhaustion of his leave.
- 14. On August 13, 1998, Brad Rockwell, DOC ADA coordinator, wrote Complainant indicating that it would be premature to investigate his claim while Complainant was on short term disability leave (which was scheduled through early December), because his condition could change by the time his leave had been exhausted.
- 15. On October 19, 1998, Dr. Barker filled out the Fitness-To-Return Certification form ("Certification"), indicating that Complainant could return to work on November 22, 1998, with a restriction of "no assaultive, physical control, and/or arrest situations."
- 16. This restriction of no assaultive, physical control, and/or arrest situations, constitutes the entirety of evidence regarding limitations on any major life activity resulting from Complainant's post-surgical recuperative status.
- 17. On October 22, 1998, Warden Embry wrote Complainant regarding the Certification, stating,
 - "I have evaluated various posts and can temporarily assign you to a post which will minimize the probability of involvement in the activities which your doctor has restricted. I do, however, need clarification on the length of time your restrictions apply, prior to your returning to work. The temporary assignment will only be for a limited time and therefore, I will not be able to allow you to return to work if the restrictions are for long term."
- 18. On October 26, 1998, prior to receiving Warden Embry's October 22, 1998 letter, Complainant wrote a letter to Embry, stating in part that he would not report for work on November 22, per Embry's July 27 letter.

19. On October, 26, 1998, after receiving Warden Embry's October 22, 1998 letter, Complainant wrote a second letter to Embry. In this letter, he stated, in part:

my physical (sic) is unwilling to specify the date when I am able to return to work without any restriction. Second, I would be willing to accept a temporary reassignment if you will personally guarantee the DOC Headquarters will endorse that I will not be involved in any assaultive, physical control, and or arrest situations. In addition, I must be assured that if requested to assist a DOC employee in such a situation that my refusal would not be grounds for personnel action or criticism by DOC supervisory personnel. . .

Obviously, your letter of 10/22/98 reaffirms your previous position that I cannot return to work with restrictions even though such restrictions are implied by the Fitness-To-Return Certificate and by past experience."

- 20. On October 29, Warden Embry wrote a response to Complainant's first October 26, 1998 letter. He stated that he had identified a post that met Complainant's restrictions on a temporary basis, and that he expected Complainant to report for work on November 22, 1998. He simply needed to know the duration of the restriction. Embry's letter also informed Complainant that his short term disability leave would be exhausted on November 21, 1998, at which time if he chose not to return to work, he would be placed on leave without pay in accordance with "Colorado Code of Regulations, Rule 7-2-5(D)(3)." Lastly, he stated that he had a duty to restore Complainant to a Correctional Security Services Officer I position, and that if Complainant sought other positions that were so classified, he should indicate what positions he was interested in. If Complainant sought other positions, he had to apply for them, via the standard personnel selection process.
- 20. On October 30, Warden Embry wrote a response letter to Complainant's second October 26, 1998 letter. He stated, in part:

"Assignment to a post based on limited duty is temporary and generally does not exceed 45 days. With your years of experience in law enforcement, your naivety surprises me in requesting the Department or I to predict future situations in the correctional environment. . . I have offered you a position which would limit the possibility of your direct involvement in ay assaultive, physicial control and/or arrest situations. This position is only a termporary solution for a specified period of time. The choice remains up to you.

If you believe that your physical condition may qualify under the Americans with Disabilities Act, you may submit a request for accommodation. I have attached the Department's Administrative Regulation and the form on which to initiate the request."

21. October 30 letter from C to Embry here.

- 22. November 3, 1998 Employee Request for Accomodation.
- 23. November 9 letter form Embry to C re: November 18 meeting.
- 24. November 23, 1998 letter from Rockwell to Embry recommending no accomodation.
- 25. Terminated on .

26.

- 27. Compliainant requests reinstatement to the Release of Health Information Technician position, back pay, attorney fees and costs.
- 28. Whistleblower stuff.

DISCUSSION

The burden is upon Respondent to prove by a preponderance of the evidence that the acts on which the discipline was based occurred and that just cause warrants the discipline imposed. *Department of Institutions v. Kinchen*, 886 P. 2d 700 (Colo. 1994). The administrative law judge, as the trier of fact, must determine whether the burden of proof has been met. *Metro Moving and Storage Co. v. Gussert*, 914 P. 2d 411 (Colo. App. 1995).

disability threshold issue.

No. 24-34-301. Definition:

physicial impairment inhibits major life activity. No impact on major life activity. This alone disposes of the case.

Complainant argues duration not an issue; not enough evidence on this issue. Indefinite. Even assuming had a disability, could C perform essential functions of position? Evidence points to no. PDQ. Contact with inmates. He wanted no contact. This amounts to special treatment, not a bar to discriminatory treatment.

even though no legal obligation to do so, Respondent offered a termporary position accommodating him. More than required.

Complainant argues others were given accomodation. Testimony was general, not specific. Even if had provided specifics, smith v. Midland Brake, 10 cir., says not to penalize employers who go beyond requirements of the law.

no whistleblower claim. No evidence of bias. Was offered temp position.

1. Did Complainant commit the acts for which she was disciplined?

The evidence demonstrates that Complainant was disciplined for two things: 1. lacking veracity in explaining her actions to the appointing authority, and 2. violating the confidentiality agreement, Wardenburg policies and procedures governing accessing and release of confidential patient information, and the requirements of her position, by accessing and releasing the chart reviews of three Wardenburg patients.

A. Lack of Veracity

Stump made it clear in his letter imposing discipline that the primary reason for disciplining Complainant was his finding that "your lack of veracity in explaining your actions is inconsistent with the high level of trust conferred upon the RHIT." The record has demonstrated, however, that Complainant did not lack veracity in explaining her actions. She was completely forthcoming at the 833 meeting and in the ensuing investigation regarding how she learned of Shostak's apparent free medical treatment, how she later approached Kim about violating the confidentiality agreement in order to provide Kim with confidential information, and, one month after the audit, how she then accessed and released the information on Shostak to Kim. Since Complainant did not lack veracity in explaining her actions, she did not commit the primary act for which she was disciplined.

B. Accessing and Releasing Confidential Patient Information

The remaining conduct of Complainant under review is her accessing of the three patients' chart reviews on November 12, 199, her inadvertent release of those chart reviews to Papacek by printing them on his printer, and her subsequent release of Shostak's chart review to Kim on November 30, 1998. The record is clear that Complainant committed these act. Complainant does not deny that she committed these acts.

Since Complainant did not lack veracity in explaining her actions throughout the 833 process, she cannot be disciplined for that.

2. Equitable Estoppel Defense

Complainant has raised the equitable estoppel defense based on Kim's approval of violating her confidentiality agreement. The defense of equitable estoppel may be applied against government agencies to prevent injustice. <u>C.F. Lytle Co. V. Clark</u>, 491 F.2d 834, 838 (10th Cir. 1974); <u>Sisneros v. Booker</u>, 981 F.Supp. 1374, 1377 (D.Colo. 1997).

The University Ombudsman, Seebok, informed Complainant that Kim had approved the sharing of confidential information in violation of her confidentiality agreement. Kim was the University administrator "at the top of the chain of authority with regard to Wardenburg."

As such, it was reasonable for Complainant to assume that Kim had authority to provide such approval on behalf of the University.

However, at the time Complainant received this approval from Kim, the only information Complainant had in her possession was the information from the get card on Shostak. Complainant could at that time have simply informed Kim of the information she had learned in reading the get card for Shosak, i.e., that apparently he had obtained services at Wardenburg at a time when he was not eligible for such services, and therefore had received them for no charge. It would then have been up to Kim to do what she saw as appropriate with that information.

By accessing Shostak's chart review, one full month after receiving Kim's permission to share confidential information, Complainant went beyond any approval Kim had given to her. Complainant did not have approval to make secret entry into the confidential patient file of Shostak. Nor did she have approval to obtain any new confidential information of any kind.

Complainant therefore willfully violated the Release of Health Information policy, which protects patients from "unauthorized inspection" of confidential information, when she accessed Shostak's chart review on her computer on November 12, 1998. Complainant also violated all Wardenburg policies governing the handling of confidential patient information by accessing Shostak's chart review for personal reasons that were unrelated to her position. She obtained <u>unauthorized</u> access to the records.

While Complainant argues that she felt she was uncovering wrongdoing by Shostak, the fact remains that this was an act unrelated to her job responsibilities, and she could have simply told Kim about her suspicions, and left it to Kim to pursue. Complainant did not have to access Shostak's chart review records to blow the whistle on him.

Patient medical information is a sacred trust. It is the most personal of all information retained in official business records. As the Wardenburg Medical Record Ethics Confidentiality Policy ("confidentiality agreement") signed by Complainant, states, "We are entrusted with a large number of Medical Records which require confidential handling. Do not betray this trust. Every employee of Wardenburg . . . will insure that [this institution] is one in which the confidentiality of Medical Records is appreciated and respected. Each employee, volunteer, or work-study student is employed upon the assurance that he/she understands and actively supports this concept." In signing this policy, Complainant agreed to "support and uphold the confidentiality of the patient's medical record and/or presence at Wardenburg." By its own terms, this policy applies not only to medical records, but to an individual's very presence at Wardenburg.

The question of whether Complainant's release of the Shostak chart review to Kim presents a closer question. Kim expressly approved Complainant's violation of the confidentiality agreement in order to share information about a supervisor at the August 1988 833 meeting. As the person at the top of the chain of command at Wardenburg, Kim

did have apparent authority to authorize that violation. Therefore, it was reasonable for Complainant to rely on that authority. Although Stump stated in his letter imposing discipline that Kim did <u>not</u> have authority to approve Complainant's violation of the confidentiality agreement, it was reasonable for Complainant to rely on Kim's apparent authority on November 30, 1998. It would be fundamentally unfair to hold Complainant responsible for conduct for which she received University approval.

It is also noteworthy that the only person to whom Complainant sought to release information was Kim herself, who, as the administrator at the top of the Wardenburg chain of command overseeing "health information management personnel", was arguably an "authorized user" under the confidentiality agreement. (See Paragraph 3). When Kim authorized the release of the information, she also took the position that she (Kim) had authority to review confidential information. In order to prevent injustice to Complainant, the University must be estopped from changing its position with respect not only to Kim's authority to authorize Complainant's release of information, but also regarding Kim's authority to review that information.

Complainant did not intentionally access either Myra Shostak's or Katherine Brummett's chart reviews. These were incidental to her accessing of Peter Shostak's and her own chart reviews. It is therefore found that those actions did not constitute a willful violation of the confidentiality agreement or university policies. Moreoever, she immediately shredded them, and there is no evidence in the record that she even reviewed those records.

In addition, Complainant did not intentionally print the chart reviews on Papacek's printer. Therefore, it is found that this inadvertent "release" was not an intentional violation of any policies or the confidentiality agreement. Further, as a Wardenburg management employee with authorization to review patients' chart reviews, it was not a violation of Wardenburg confidentiality policies for Papacek to inspect them under these circumstances.

Complainant has therefore raised an equitable estoppel defense only in regard to her release of the Shostak chart review to Kim on November 30, 1998.

3. Arbitrary and Capricious Action

Arbitrary and capricious action can arise in one or more of three ways: a) by neglecting or refusing to procure evidence; b) by failing to give candid consideration to the evidence; and c) by exercising discretion based on evidence in such a way that reasonable people must reach a contrary conclusion. <u>Van de Vegt v. Board of Commissioners</u>, 55 P.2d 703, 705 (Colo. 1936).

In this case the appointing authority, Stump, was told by Complainant at the 833 meeting, and in her attorney's follow up letter, that the accessing of the chart reviews was not related to the audit. Despite these statements, Stump specifically found that

Complainant had told him that she had accessed the chart reviews as a direct result of her work on the audit, and had misrepresented herself on this issue. Stump ignored or overlooked critical evidence provided by Complainant. His action of disciplining Complainant for her lack of veracity on this issue was therefore arbitrary and capricious.

Complainant's immediate supervisor, Spurlin, also learned one or two months after Complainant was disciplined that Complainant had worked on an out guide audit in October of 1998. This information corroborated Complainant's statements made throughout the 833 process, and therefore meant that the entire basis for the finding of Complainant's lack of veracity was unfounded. Complainant had suffered a significant setback professionally and financially, and had by then appealed her demotion. It was arbitrary and capricious for Respondent to fail to follow up on this critical corroborating evidence in an effort to actively pursue the truth. Instead, it allowed the finding of Complainant's lack of veracity to remain in her permanent personnel record.

4. Sanction

This case presents a number of mitigating and aggravating circumstances. In mitigation, the record is clear that the primary reason for discipline in this case was Complainant's lack of veracity, which was <u>not</u> proven at hearing. Any discipline based on that conduct must be overturned. In addition, this was Complainant's first such violation. Complainant has had a ten year track record of solid work performance at Wardenburg. Complainant did have the blessing of the top Wardenburg administrator to share confidential information about a supervisor at her 833 meeting. It is understandable, to some extent, that Complainant could translate this approval into an authorization to access the confidential information as well. Lastly, Complainant only released the information to Kim, at the top of the Wardenburg chain of command, not to an independent third party.

However, Complainant did willfully violate the confidentiality agreement and Wardenburg policies regarding handling of confidential patient information. This is a serious enough violation of Complainant's high position of trust to warrant a finding that corrective action could appropriately be bypassed. Wardenburg must be free to send a message to all employees that immediate disciplinary action will be imposed against any employee for breach of confidentiality regarding patient information. Further, Complainant was in the best position of anyone at Wardenburg to know all policies and procedures relating to handling of confidential information. She knew what a serious breach of confidentiality it was to access Shostak's billing records, which revealed the type of treatment he received, from whom, on what date, and which also would have revealed any diagnoses, had there been any. Further, the only reasons for making such unauthorized access were to remove a letter of counseling from her record and to prove Shostak to have violated his own rules.

In view of the fact that the primary basis for discipline was Complainant's lack of veracity, which has been disproven, as well as her flawless ten-year career at Wardenburg with no prior performance issues, it is found that a permanent demotion is outside the

range of reasonable alternatives available to the appointing authority in this case. It can only be assumed, based on the clear language in Stump's letter imposing discipline, that had he not assumed erroneously that Complainant lied to him about the entire incident, Stump would have imposed a lesser discipline in this case.

The University is free to impose corrective action, up to and including a temporary demotion for up to three months. The permanent demotion is rescinded.

5. Attorney fees

Section 24-50-125.5, C.R.S (1998), allows the awarding of attorneys fees only upon a finding "that the personnel action from which the proceeding arose was instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless." This case presents somewhat of a close call, given Respondent's failure to act on the information received after discipline was imposed. However, since Complainant did access and release confidential information without patient authorization,

and since the circumstances of Kim's authorization were muddled by the fact it went through Seebok, Respondent did not act in bad faith, maliciously, or as a means of harassment in instituting discipline against Complainant, and c. Nor was the action of Respondent groundless,.

Therefore, no attorney fees are ordered in this case.

CONCLUSIONS OF LAW

- 1. Complainant did not engage in the primary act for which she was disciplined, namely, being untruthful in explaining her actions. Complainant did access and release confidential information without patient authorization, but did so in reasonable reliance upon Vice Chancellor Kim's approval. The University is equitably estopped from holding Complainant responsible for her actions taken in reliance on Kim's approval.
 - 2. Respondent's actions were arbitrary and capricious.
 - 3. Neither party is entitled to an attorney fee award.

ORDER

The relief requested by complainant is granted. Respondent is ordered to reinstate

Complainant to her former position of Release of Health Information Technician, and to pay her back pay minus whatever compensation she has received in her new position since her demotion. The discipline shall be expunged from Complainant's personnel record.

DATED this day of	
August, 1999, at	Mary S. McClatchey
Denver, Colorado.	Administrative Law Judge

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

- 1. To abide by the decision of the Administrative Law Judge ("ALJ").
- To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.; Rule R-8-58, 4 Code of Colo. Reg. 801. If a written notice of appeal is not received by the Board within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ may be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ. The filing of a petition for reconsideration does not extend the thirty calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.

RECORD ON APPEAL

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The fee to prepare the record on appeal is <u>\$50.00</u> (exclusive of any transcription cost). Payment of the preparation fee may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 45 days of the date of the designation of record. For

additional information contact the State Personnel Board office at (303) 866-3244.

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double spaced and on 8 ½ inch by 11 inch paper only. Rule R-8-64, 4 CCR 801.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R-8-66, 4 CCR 801. Requests for oral argument are seldom granted.

CERTIFICATE OF MAILING

This is to certify that on the _____ day of August, 1999, I placed true copies of the foregoing INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE in the United States mail, postage prepaid, addressed as follows:

Douglas C. Thorburn Thorburn, Sakol & Throne 255 Canyon Boulevard at Cloud Creek, Suite 100 Boulder, Colorado

L. Louise Romero Managing Senior Associate University Counsel 202 Regent Administrative Center Boulder, Colorado 80309